No. 17-965

In The
Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., *PETITIONERS*

v.

STATE OF HAWAII, ET AL., *RESPONDENTS.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* IMMIGRATION EQUALITY, THE NEW YORK CITY GAY AND LESBIAN ANTI-VIOLENCE PROJECT, THE NATIONAL QUEER ASIAN PACIFIC ISLANDER ALLIANCE, THE LGBT BAR ASSOCIATION OF LOS ANGELES, THE LGBT BAR ASSOCIATION OF GREATER NEW YORK, THE LESBIAN AND GAY BAR ASSOCIATION OF CHICAGO, GLBTQ LEGAL ADVOCATES & DEFENDERS, BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM, AND OTHERS IN SUPPORT OF *RESPONDENTS*

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STATEMENT OF INTEREST

This brief sets forth the legal and policy concerns of *Amici Curiae* Immigration Equality, The New York City Gay And Lesbian Anti-Violence Project, The National Queer Asian Pacific Islander Alliance, The LGBT Bar Association of Los Angeles, The LGBT Bar Association of Greater New York, the Lesbian and Gay Bar Association of Chicago, GLBTQ Legal Advocates & Defenders, Bay Area Lawyers for Individual Freedom, API Equality-Los Angeles, API Equality-Northern California, Invisible to Invincible: Asian Pacific Islander Pride of Chicago, KhushDC, Massachusetts Area South Asian Lambda Association, Queer South Asian Collective, The South Asian Lesbian and Gay Association of New York City, and Trikone-Northwest (collectively, "*Amici Curiae*") regarding the President's Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats (Sept. 24, 2017) (the "Proclamation" or "P.P.").[1]

Amici Curiae are organizations devoted to the promotion of equal treatment for lesbian, gay, bisexual, transgender, and queer ("LGBTQ" or "LGBTI") individuals in the United States and around the world, including through organizing, education, counseling, direct legal representation,

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[1] No party to the appeal, nor counsel for any party to the appeal, authored any part of this brief. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. The parties have consented to the filing of this *amicus* brief.

and advocacy. In particular, *Amici Curiae* believe that LGBTQ individuals are entitled to equal treatment in the immigration context and under the law in general.

Amici Curiae are deeply troubled by the impact that the Proclamation would have on LGBTQ people in the United States and in the eight countries from which the Proclamation would drastically restrict — if not effectively ban — immigration. Indeed, for all of its negative effects generally, the Proclamation will inflict unique harm on LGBTQ people in the eight target countries by foreclosing escape from the venomous, and often life-threatening, anti-LGBTQ conditions that prevail there. The Proclamation will also harm LGBTQ Americans by blocking potential LGBTQ reunifications with loved ones in the eight countries.

The Proclamation is bad policy made worse because it assaults established United States legal principles and constitutionally-protected rights. *Amici Curiae* respectfully urge the Court to affirm the District of Hawaii's preliminary injunction in *Hawaii v. Trump*, No. 17-cv-50, 2017 WL 4639560 (D. Haw. Oct. 17, 2017), and avoid the significant, irreversible harms that the Proclamation would inflict on the LGBTQ community and others while the litigation proceeds below.

SUMMARY OF ARGUMENT

Individuals who identify as lesbian, gay, bisexual, transgender and queer live, in many countries around the world, in persistent, grave danger. As of October 2016, homosexual conduct was still outlawed in more than 70 countries worldwide, 13 of which made such conduct punishable by death.[2] Some regimes deny the very existence of LGBTQ people, making it impossible for LGBTQ individuals to seek government protection from the severe persecution and violence to which they are routinely subjected.[3]

Like other immigrants, LGBTQ persons who already have family or partners living in the United States are eligible to apply for visas based on this family status. The process is long and difficult in the best of circumstances and the difficulty is

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[2] Aengus Carroll, *State-Sponsored Homophobia: A World Survey of Sexual Orientation Laws*, International Lesbian, Gay, Bisexual, Trans and Intersex Association, at 37-40 (12th ed. 2017), http://ilga.org/downloads/2017/ILGA_State_Sponsored_Homophobia_2017_WEB.pdf ("*World Survey*").

[3] *See, e.g.*, Human Rights Watch, *We Are a Buried Generation* (Dec. 15, 2010), https://www.hrw.org/report/2010/12/15/we-are-buried-generation/discrimination-and-violence-against-sexual-minorities ("*Buried Generation*") (recounting statement of Iran's then-President Mahmoud Ahmadinejad in 2007 that "[i]n Iran we don't have homosexuals like you do in your country. This does not exist in our country."); Choe Sang-Hun, *North Korean Defector Opens Up About Long-Held Secret: His Homosexuality*, N.Y. Times (June 5, 2015), https://www.nytimes.com/2015/06/06/world/asia/north-korea-defector-jang-yeong-jin-gay.html?_r=0 ("*North Korean Defector*").

compounded by the Proclamation, which, halts visa processing from Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen (the "eight countries").

For LGBTQ individuals, this shutdown is not simply a bureaucratic inconvenience, but potentially a matter of life and death. A family-based visa delayed by the Proclamation is, in effect, a visa denied. Visa approvals thwarted by the Proclamation mean LGBTQ individuals must remain in hostile and unsafe conditions indefinitely, delaying reunification with family members in safe communities. The danger is heightened because merely seeking visas from local consular officials, while citing a same-sex relationship as the basis for a waiver, reveals applicants' sexual orientations or gender identities to local communities and government officials. Moreover, because the Government will only provide waivers to applicants with "formal" and "documented" close familial relationships, LGBTQ individuals — whose relationships are neither sanctioned nor documented by their countries of origin — stand to be disproportionately excluded from these waivers.

Existing law thoroughly establishes that the public's interest lies in ensuring that U.S. citizens and residents are able to safely bring their LGBTQ partners and family members to the U.S. and away from these hostile environments. As a result, in light of the grave harms threatened by enforcement of this heedless and context-blind Proclamation, the Ninth Circuit properly affirmed the District of Hawaii's preliminary injunction.

FACTUAL BACKGROUND

I. MANY LGBTQ INDIVIDUALS FACE PERSECUTION AND HOSTILE SOCIAL ENVIRONMENTS IN THEIR COUNTRIES OF ORIGIN, ESPECIALLY IN THE EIGHT COUNTRIES TARGETED IN THE PROCLAMATION

While the United States recently has made strides in advancing LGBTQ rights, including the right to form an officially-recognized family, the situation in many countries around the globe remains exceedingly grim. Even in countries where LGBTQ status is not considered a crime, LGBTQ individuals are still unable to forge family relationships due to severely anti-LGBTQ legal regimes.[4] Consequently, for those seeking visas based on family or relationship status, documenting their LGBTQ status in their countries of origin leaves them exposed to persecution and violence, causing many visa-seekers to fear the consequences of providing documentation of their status for visa applications.

The Proclamation significantly impairs, if not entirely block, many LGBTQ individuals' chances at family unification and dramatically increase the risk of harm to these applicants abroad. Seven of the eight countries targeted by the Proclamation explicitly criminalize homosexual conduct, with some of them authorizing or even mandating the death

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[4] *World Survey*, *supra* n.2, at 26.

penalty for such offenses.[5] And in each of these countries, LGBTQ individuals face societal and institutionalized homophobia, with many suffering persecution from multiple sources, including disapproving family members, government and police forces, and terrorist groups. The treatment of LGBTQ people in the eight countries — treatment to which the Proclamation would indefinitely consign LGBTQ family members — is detailed below:

Chad. On December 12, 2016, Chad's National Assembly approved a revision to the penal code that criminalizes same-sex relations and makes them punishable by imprisonment and a fine.[6] In support of the new law, a former prime minister stated, "Homosexuality is condemned by all religions. We do not have to forgive something that God himself rejects because Westerners have said this or that."[7] As a result of this new law, LGBTQ people in Chad are now exposed to threats of criminal and civil prosecution by virtue of their sexual orientation or gender identity.

Iran. As the U.N. Human Rights Council has noted and condemned on multiple occasions, LGBTQ

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[5] *Id.* at 37-40.

[6] U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *2016 Country Reports on Human Rights Practices – Chad* 23 (2016), https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dlid=265238.

[7] Glenn Garner, *Parliament of Chad Calls for Criminalization of Homosexuality*, Out Magazine (Dec. 16, 2016), https://www.out.com/news-opinion/2016/12/16/parliament-chad-calls-criminalization-homosexuality.

people in Iran consistently "face harassment, persecution, cruel punishment, and are denied basic human rights." [8] Iran criminalizes same-sex relations between consenting adults and mandates the death penalty for the "passive" male engaged in "sodomy" and for fourth-time "lesbian" offenders.[9] Authorities conduct many of these executions in public.[10] Those who are not subject to the death penalty may nonetheless be punished by up to 100 lashes for engaging in same-sex relations.[11]

LGBTQ people in Iran also face pervasive harassment, abuse, and violence "at the hands of private actors, including members of their family and society at large," as well as "members of Iran's police, security, and intelligence forces in public spaces."[12] The Iranian Penal Code does not include

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[8] U.N. Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights in the Islamic Republic of Iran* 20, U.N. Doc. A/HRC/22/56 (Feb. 28, 2013), http://www.ohchr.org/Documents/Countries/IR/A-HRC-22-56_en.pdf.

[9] Mission for Establishment of Human Rights in Iran, *Islamic Penal Code of Iran*, Part 2, Article 111; Part 3, Article 131, at 5, 7, http://mehr.org/Islamic_Penal_Code_of_Iran.pdf ("*Iran Penal Code*").

[10] U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *2016 Country Reports on Human Rights Practices – Iran* 3 (2016), http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dlid=265496 ("*Iran Country Report*").

[11] *Iran Penal Code*, *supra* n.9, Part 2, Articles 112, 113; Part 3, Article 129, at 5-7.

[12] *Buried Generation*, *supra* n.3.

hate crime laws or other criminal justice mechanisms to aid in the prosecution of bias-motivated crimes.[13]

Libya. Libya's Penal Code criminalizes consensual same-sex sexual acts, which are punishable by up to five years in prison for both partners.[14] "In the Libyan society, to be gay [is] considered against Islam."[15] Indeed, in 2012, Libya's representative to the U.N. proclaimed in a U.N. Human Rights Council meeting that "gays threaten the continuation of the human race."[16]

Reflecting these social mores, official and societal persecution and violence against LGBTQ individuals in Libya are widespread, and no legislation exists to protect LGBTQ individuals against such mistreatment.[17] In its 2016 report on

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13 *Iran Country Report*, *supra* n.10, at 43-44.

14 Libya: Penal Code of 1953, as amended by Law 70 of October 2, 1973, Articles 407(4), 408(4).

15 U.N. Human Rights Council, *Summary Prepared by the Office of the United Nations High Commissioner for Human Rights* (Feb. 23, 2015), http://www.ecoi.net/file_upload/1930_1453302677_g1503174.pdf.

16 Canada: Immigr. and Refugee Bd. of Canada, *Libya: Situation of sexual minorities, including legislation; treatment by society and authorities; state protection and available services (2011-July 2014)* (July 17, 2014), http://www.refworld.org/docid/54ca12544.html ("*Libya: Situation of Sexual Minorities*").

17 *See id.*; U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *2016 Country Reports on Human Rights Practices – Libya*, at 28 (2016), http://www.state.gov/j/drl/rls/hrrpt/

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human rights in Libya, the State Department noted several reports of physical violence, harassment, and blackmail based on sexual orientation and gender identity. "Militias often policed communities to enforce compliance with militia commanders' understanding of 'Islamic' behavior, and harassed and threatened with impunity individuals believed to have LGBTI orientations and their families."[18] For example, in 2013, reports emerged that 12 men, believed to be homosexual, were detained and threatened with execution by an armed group seeking to enforce a strict form of Islamic Sharia law.[19] Other individuals have reported being arrested and raped by Libyan police due to their sexual orientation.[20]

North Korea. As Human Rights Watch has noted, "North Korea is one of the most repressive authoritarian states in the world."[21] The coercive, intrusive atmosphere extends to nearly every aspect

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humanrightsreport/index.htm?year=2016&dlid=265510 ("*Libya's Human Rights Practices*").

18 *Libya's Human Rights Practices*, *supra* n.17, at 28.

19 United Kingdom: Foreign and Commonwealth Office, *Human Rights and Democracy: The 2012 Foreign & Commonwealth Office Report - Libya* 194 (Apr. 15, 2013), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/408376/Cm_8593_Accessible_complete.pdf.

20 *Libya: Situation of Sexual Minorities*, *supra* n.16.

21 Human Rights Watch, *World Report 2018: Events of 2017*, at 398, https://www.hrw.org/sites/default/files/world_report_download/201801world_report_web.pdf.

of North Koreans' daily lives, including their sexuality and sexual orientation. As one North Korean refugee recently explained, the totalitarian government in North Korea "maintains that homosexuality does not exist because people there live with a 'sound mentality and good morals.'"[22] Consequently, homosexuality is not openly discussed in North Korea, and some individuals report that "no ordinary people conceptually understand what homosexuality is."[23] Due to this all-encompassing government oppression, "[t]here are many homosexuals in North Korea who live a miserable life without even knowing why."[24]

Consistent with its totalitarian control over daily life, North Korea's Criminal Code prohibits conduct that "reflects decadent, carnal or foul contents" as well as any "obscene activities."[25] The government reportedly has executed LGBTQ individuals under these laws, noting that "[t]hey were badly influenced by capitalism . . . and brought corruption of public morals."[26]

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22 *North Korean Defector*, *supra* n.3.

23 *Id.*

24 *Id.*

25 Criminal Law of the Democratic People's Republic of Korea (2009), Articles 194, 262.

26 *North executes lesbians for being influenced by capitalism*, The Korea Times (Sept. 29, 2011), http://www.koreatimes.co.kr/www/news/nation/2011/09/182_95702.html.

North Korea's government and state-controlled media openly condemn LGBTQ individuals, even in international affairs. For example, in responding to a United Nations investigation into human rights abuses in the country, the state news agency claimed that the "practice [of homosexuality] can never be found in the DPRK" and that it was "ridiculous for such gay [*sic*] to sponsor dealing with others' human rights issue."[27]

Somalia. Homosexual conduct is outlawed in Somalia. In northern Somalia, where the Somalian Penal Code governs, homosexual intercourse is punishable by imprisonment from three months to three years.[28] In southern Somalia, under the control of militants, consensual same-sex sexual acts are punished by flogging or by death.[29]

Somali society largely deems questions about sexual orientation and gender identity to be taboo.[30]

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[27] Nick Robins-Early, *North Korea Responds To Human Rights Report With Homophobic Statement*, HuffPost (Apr. 23, 2014), https://www.huffingtonpost.com/2014/04/23/north-korea-homophobia_n_5198717.html.

[28] Somalia: Penal Code, Legislative Decree No. 5/1962, Article 409.

[29] Amnesty Int'l, *Making Love a Crime, Criminalization of Same-Sex Conduct in Sub-Saharan Africa* (June 24, 2013), https://www.amnestyusa.org/reports/making-love-a-crime-criminalization-of-same-sex-conduct-in-sub-saharan-africa.

[30] U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *2016 Country Reports on Human Rights Practices – Somalia*, at 38 (Mar. 3, 2017), *(cont'd)*

Thousands of LGBTQ individuals in Somalia keep their sexual orientation a "closely guarded secret," knowing that revealing that information could attract potential retribution from terrorist groups or armed gangs.[31] As one source described it, "LGBT people in Somalia are silent and invisible, often facing violence and rejection from their families and communities that results in honour killings and suicides."[32]

Violence against LGBTQ people in Somalia is rampant. For example, there have been reports of gangs of armed men searching the streets of Somalia for people suspected of being LGBTQ.[33] The U.N. Human Rights Council reported a 2013 incident in which a gay Somali 18-year-old teen was blindfolded, buried up to his waist, and then stoned to death for allegations of homosexuality.[34]

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http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dlid=265300.

31 Catarina Stewart, *Young Somali activist sentenced to death for being a lesbian*, The Independent (Jan. 30, 2016), http://www.independent.co.uk/news/world/Africa/young-somali-activist-sentenced-to-death-for-being-a-lesbian-a6844216.html.

32 Swedish Int'l Government Cooperation Agency, *The Rights of LGBTI People in Somalia*, at 1 (Nov. 2014), http://www.sida.se/globalassets/sida/eng/partners/human-rights-based-approach/lgbti/rights-of-lgbt-persons-somalia.pdf.

33 *Id.*

34 U.N. Human Rights Council, *Universal Periodic Review second cycle, Summary of stakeholders' information*, at 3 (Nov. 6, 2015).

Syria. The Syrian Penal Code prohibits "carnal relations against the order of nature," and provides for at least three years' imprisonment for violations.[35] Though the law does not specifically address LGBTQ activity, police have used this provision to persecute LGBTQ people.[36] Police also frequently target LGBTQ individuals by arresting them without basis on pretexts such as abusing social values; selling, buying, or consuming illegal drugs; and organizing and promoting "obscene" parties.[37]

The State Department has recognized "overt societal discrimination based on sexual orientation and gender identity in all aspects of [Syrian] society."[38] Syrian media has reported numerous examples of government and police forces using accusations of homosexuality as a pretext to detain, arrest, and torture LGBTQ people.[39]

LGBTQ people in Syria also face extreme threats of violence at the hands of militant Islamist groups. Non-governmental organizations have documented such violence, including against a 15-

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35 Syria: Penal Code of 1949, Articles 517, 520.

36 U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *2016 Country Reports on Human Rights Practices – Syria*, at 53 (Mar. 29, 2017), http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dlid=265520.

37 *Id.*

38 *Id.*

39 *Id.*

year-old boy who was stoned to death after he was accused of being gay.[40] According to Human Rights Watch, at least twenty-five Syrian men were murdered in 2016 by extremist groups "on suspicion of homosexuality or for sodomy."[41] According to human rights watchers, "some armed groups have engaged in horrific campaigns against suspected LGBTI persons in Syria, including torture, stoning, beheading, and burning people alive."[42] Amnesty International documented the execution of three men — one of whom was just 17 years old — accused of homosexuality.[43] A witness to the shooting described the horrific scene: "When I approached the crowd, I saw the body of the boy shot twice. . . . A man standing there told me that he was shot . . . in front of all the people because he was gay."[44]

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[40] Human Rights Watch, *World Report 2017: Events of 2016*, at 575-76, https://hrw.org/sites/default/files/world_report_download/wr2017-web.pdf.

[41] *Id.*

[42] United Nations High Commissioner for Refugees, *Sexual Violence Against Men and Boys in the Syria Crisis* at 27 (Oct. 2017), https://data2.unhcr.org/en/documents/download/60864.

[43] Amnesty Int'l, *Torture was my Punishment: Abductions, Torture and Summary Killings Under Armed Group Rule in Aleppo and Idleb, Syria*, at 28 (July 2016), https://www.amnestyusa.org/reports/torture-was-my-punishment-abductions-torture-and-summary-killings-under-armed-group-rule-in-aleppo-and-idleb-syria/.

[44] *Id.*

Venezuela. In Venezuela, LGBTQ individuals "constantly live [in] situations of discrimination, threats and attacks against their moral, psychological [and] physical integrity, and still lack legal protection which makes them defenseless citizens in an atmosphere of alarming growth of homophobia and transphobia, as a result of the absence of laws, policies and institutions that guarantee equality in the exercise of fundamental rights and freedoms."[45] According to a 2016 report, 175 hate crimes occurred on the basis of sexual orientation, gender identity and expression between January 2009 and May 2016.[46] Victims of these hate crimes frequently do not report incidents to the authorities, since they are often subjected to threats or extortion if they file formal complaints. [47] Perpetrators of these hate crimes often act with

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[45] Red LGBTI de Venezuela and Unión Afirmativa de Venezuela, *Report of the LGBTI Network of Venezuela to the United Nations Human Rights Committee on the Fourth Periodic Report of Venezuela concerning the International Covenant on Civil and Political Rights during the 114th Period of Sessions*, at 3 (May 2015), http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/VEN/INT_CCPR_CSS_VEN_20596_E.pdf ("*Venezuela Report*").

[46] Red LGBTI de Venezuela and Unión Afirmativa de Venezuela, *Universal Periodic Review- Venezuela (November, 2016) A summary on Lesbian, Gay, Bisexual Trans and Intersex (LGBTI) human rights issues in Venezuela and recommendations*, http://ilga.org/downloads/SUMMARY_VENEZUELA.pdf.

[47] U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *2016 Country Reports on Human Rights Practices – Venezuela*, at 36 (2016), https://www.state.gov/documents/organization/265834.pdf.

impunity since "no progress has been made to investigate and prosecute acts of violence against lesbian, gay, bisexual, trans and/or intersex people."[48] Although only a narrow category of Venezuelan government officials is affected by the Proclamation, those individuals are no less affected by such threats to their personal safety. *See* P.P. § 2(f).

Yemen. "Yemen is a conservative Arab state where homosexuality is seen as taboo and is condemned under the country's strong Islamic beliefs."[49] Yemen's Penal Code outlaws same-sex relations, with punishments ranging from 100 lashes to death by stoning.[50] Yemen's laws similarly do not protect against discrimination or hate crimes against LGBTQ individuals.[51] Quite the opposite. "[T]he most serious issue connected to the ban on

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[48] *Venezuela Report*, *supra* n.45, at 10.

[49] Int'l Refugee Rights Initiative, *Rights In Exile Programme, Yemen LGBTI Resources*, http://www.refugeelegalaidinformation.org/yemen-lgbti-resources.

[50] Int'l Labour Org., *Republican Decree for Law No 12 for the Year 1994 Concerning Crimes and Penalties*, Section 11, Article 264, https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/83557/92354/F1549605860/YEM83557.pdf.

[51] U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *2016 Country Reports on Human Rights Practices – Yemen*, at 44 (2016), http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dlid=265528 ("*Yemen Country Report*").

homosexuality is that victims of hate crimes cannot seek help from the authorities."[52]

Because of the risk of criminal prosecution and severe punishment, as well as the societal condemnation they face, most LGBTQ individuals in Yemen are forced to live in hiding, and few LGBTQ people are open about their sexual orientation or gender identity.[53]

ARGUMENT

I. THE UNIQUE HARDSHIPS IMPOSED ON LGBTQ POPULATIONS BY THE PROCLAMATION ARE CONTRARY TO U.S. LAW AND AGAINST THE PUBLIC INTEREST

A. Constitutional And Federal Law Emphasize The Importance Of Family Reunification And Marriage

The public interest in protecting family units, both LGBTQ and otherwise, is enshrined in constitutional law. As this Court has long recognized, the right to marry is fundamental. *See Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) ("[T]he right 'to marry, establish a home and bring up children' is a central part of the liberty protected by

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52 Ben Gladstone, *For Yemen's gay community social media is a savior*, The Irish Times (Aug. 22, 2015), http://www.irishtimes.com/news/world/middle-east/for-yemen-s-gay-community-social-media-is-a-saviour-1.2324447.

53 *Yemen Country Report*, *supra* n.51, at 42-43.

the Due Process Clause." (citation omitted)). In *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015), the Court made clear that these rights extend to LGBTQ people. 135 S. Ct. at 2604 ("The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.").

The right to marry regardless of sexual orientation inheres in all persons within the United States, not just U.S. citizens. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (the right "to marry, establish a home and bring up children" is a central part of the liberty protected by the Due Process Clause); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent").

The United States' commitment to enabling families to live together is also embodied in its visa policies, which provide special allowances for family-sponsored visas. *See, e.g.*, 8 U.S.C. § 1153(a)(2) (allowing legal permanent residents to sponsor spouses, children, and unmarried sons or daughters). Members of the LGBTQ community may normally avail themselves of such family reunification visas to assist family members living abroad, including those suffering persecution in countries that discriminate against LGBTQ people. For example, LGBTQ individuals might apply for admission on a K-1 "fiancé(e)" visa, which allows the K-1 visa applicant's sponsor in the United States to petition the

government to bring the applicant to the United States to be married.[54]

Immigration law must take family unity into account because "[p]ublic policy supports recognition and maintenance of a family unit." *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005) ("The Immigration and Nationality Act ('INA') was intended to keep families together. It should be construed in favor of family units and the acceptance of responsibility by family members."); *see also INS v. Errico*, 385 U.S. 214, 220 (1966) ("Congress felt that, in many circumstances, it was more important to unite families and preserve family ties than it was to enforce strictly the quota limitations or even the many restrictive sections that are designed to keep undesirable or harmful aliens out of the country.").[55]

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[54] *See* U.S. Dep't of State, Bureau of Consular Affairs, *Nonimmigrant Visa for a Fiancé(e) (K1)*, https://travel.state.gov/content/visas/en/immigrate/family/fiance-k-1.html (last visited Nov. 16, 2017); U.S. Citizenship and Immigration Services, *K-1 Process: Step by step*, https://www.uscis.gov/family/k-1-process-step-step (last visited Nov. 16, 2017). Once approved, the applicant must submit significant documentation, including proof to substantiate the applicant's relationship with his or her fiancé(e) in the United States, to a U.S. Consulate or Embassy, participate in an in-person interview, and submit to a medical examination. *Id.*

[55] Congress recognized in enacting and amending the INA that the immigration system is designed to preserve family units. *See* H.R. Rep. No. 85-1199, at 2 (1957) (the "legislative history of the [INA] clearly indicates that Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united."); H.R. Rep. No. 1365, 82d Cong., 2d Sess., 29 (1952) (the INA implements "the underlying intention

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Moreover, the value of family unification is an important limitation on deportation proceedings, wherein the Government is required to consider "humanitarian or public interest considerations," including the "compelling humanitarian interest in keeping families united." *United States v. Raya-Vaca*, 771 F.3d 1195, 1207-08 (9th Cir. 2014) (citing cases).

The United States has further recognized that the public interest includes consideration of LGBTQ families by its ratification of the International Covenant on Civil and Political Rights ("ICCPR") in 1992. 138 Cong. Rec. S4781-01 (daily ed. Apr. 2, 1992).[56] Specifically, in ratifying the ICCPR, the United States recognized that its domestic law

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of our immigration laws regarding the preservation of the family unit"); *cf. Fiallo v. Bell*, 430 U.S. 787, 795 n.6 (1977) ("[T]he legislative history of the provision at issue here establishes that congressional concern was directed at 'the problem of keeping families of United States citizens and immigrants united.' To accommodate this goal, Congress has accorded a special 'preference status' to certain aliens who share relationships with citizens or permanent resident aliens.").

[56] Even if the ICCPR is not a self-executing treaty, the United States declared that "U.S. law generally complies with the Covenant[.]" S. Exec. Report 102-23 (102d Cong., 2d Sess.). Ratified treaties — even without implementing legislation — remain the supreme law of the land. *See* U.S. Const. art. VI, cl. 2. Thus, the ICCPR may be a "useful guide" to interpret domestic law. *See Khan v. Holder*, 584 F.3d 773, 783 (9th Cir. 2009) (a treaty that does not have force of law nonetheless serves as a "useful guide" in interpreting other provisions of law) (citation omitted).

incorporates the fundamental precept that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State." ICCPR, art. 23, § 1. That principle obligates the United States to recognize the right of a family to live together, and to adopt appropriate measures "to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons."[57]

B. "Familial Relations" Should Be Construed Broadly To Give Equal Dignity To LGBTQ Families

In both the immigration context and throughout the law, policies protecting and valuing family reunification and "familial relations" should cover *all* families — including embracing kinship arrangements that, due to discriminatory legal barriers, cultural factors, or circumstance, do not fit the traditional nuclear family model. A narrow conception of "family" that is limited to immediate legal or genetic family, as is the case for the "close familial relationship" waivers under the Proclamation, *see* Section II *infra*, fails to account for the lived experiences of many LGBTQ families.

Accordingly, a narrow construction of familial relationships would cause concrete harms for LGBTQ individuals by excluding from admission to the United States in-laws, extended family, and

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[57] Human Rights Committee, *General Comment No. 18, para. 6*, U.N. Doc. HRI/GEN/1Rev.1, at 26 (1994).

others whose relationships are no less "close" or "bona fide" than traditional nuclear family members.

For instance, same-sex marriage and step-parent or joint adoption of children by same-sex couples are not permitted in any of the eight countries.[58] As a result, LGBTQ families in these countries may be made up of permanent partners, parents, and children who are not legally recognized as belonging to the same family.[59] Moreover, many LGBTQ people, disowned by immediate family because of their sexual or gender identity, are raised by grandparents or other extended family, or form their own supportive networks with legally unrelated people. Indeed, many LGBTQ people are forced to flee violence and oppression from their families of origin because of their sexual or gender identity. To the extent they have "traditional" family members in the United States, they may be unwilling or unable to draw upon those relationships.

In this country, too, non-nuclear families are increasingly common. As this Court noted seventeen years ago, "[t]he demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household." *Troxel v. Granville*, 530 U.S. 57, 63 (2000). The number of

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[58] *See World Survey*, *supra* n.3, at 68-77 (surveying countries that recognize marriage and adoption by same-sex couples).

[59] *See Obergefell*, 135 S. Ct. at 2595 (discussing the legal patchwork that precluded adopted children of LGBTQ families from claiming two legal parents).

people living in multi-generational or skipped-generation families in the United States has doubled in recent decades. [60] Likewise, many LGBTQ individuals in the United States rely on "families of choice" or alternative family structures for the support that their biological families are unable or unwilling to provide.[61] This Court has acknowledged that such non-traditional families are no less worthy of protection. "Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family." *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 503 (1977) (association with extended family members is constitutionally protected); *see also Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545-46 (1987) (the Constitution "protects those relationships, including family relationships, that presuppose deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life") (citations omitted). In

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[60] *See* Richard Fry & Jeffrey S. Passel, *In Post-Recession Era, Young Adults Drive Continuing Rise in Multi-Generational Living*, Pew Research Center (July 17, 2014), http://www.pewsocialtrends.org/2014/07/17/in-post-recession-era-young-adults-drive-continuing-rise-in-multi-generational-living/ ("A record 57 million Americans . . . lived in multi-generational family households in 2012, double the number who lived in such households in 1980.").

[61] *See generally* Soon Kyu Choi & Ilan H. Meyer, *LGBT Aging: A Review of Research Findings, Needs, and Policy Implications*, Los Angeles: The Williams Institute (Aug. 2016), http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Aging-A-Review.pdf.

the immigration context, the reason for this flexibility is simple: the "humane purpose of the [INA] to reunite families would be frustrated" by an overly strict interpretation of who is considered a family member. *Kaliski v. Dist. Dir. of INS*, 620 F.2d 214, 217 (9th Cir. 1980) (father was not required to prove under the strict laws of his home country his relationship with his child born out of wedlock; the "purpose of the Act . . . is to prevent continued separation of families").

As the District of Hawaii recently observed, "context matters" when defining familial relationships.[62] Recognizing that families do not look the same everywhere, the UNHCR has advocated, with respect to family reunification, that "[e]conomic and emotional ties should be given the same weight in reunification as relationships based on blood ties or legally sanctioned unions."[63] International humanitarian law supplies a context-sensitive approach, "recogniz[ing] that a family consists of those who consider themselves and are

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[62] Order, *Hawaii v. Trump*, No. 1:17-cv-00050-DKW-KSC, 2017 WL 2989048, at 12 (D. Haw. July 13, 2017).

[63] Kate Jastram & Kathleen Newland, *Family unity and refugee protection*, Refugee Protection in International Law: UNHCR's Global Consultations on International Protection 586 (Erika Feller, *et al.* eds., 2003) (citing UNHCR, *Background Note: Family Reunification in the Context of Resettlement and Integration*, Annual Tripartite Consultations on Resettlement, Geneva 2 (June 2001)), http://www.unhcr.org/419dbf664.html.

considered by each other to be part of the family, and who wish to live together."[64]

LGBTQ people come to the United States to achieve formal recognition and protection for their often unconventional families. A broad construction of "family" serves the public interest in family reunification and avoids perpetuating the policies that prevent LGBTQ people in the eight countries from realizing co-equal status in society.

II. THE PROCLAMATION CONTRAVENES U.S. LAW AND POLICY, WHICH ENTITLE LGBTQ INDIVIDUALS TO EQUAL TREATMENT AS IMMIGRANTS

Many LGBTQ individuals apply for visas to permanently relocate to the United States, including the spouses, parents, children, and fiancés of U.S. citizens, residents, and asylees. The Proclamation shuts down visa processing for certain visa applicants from the eight countries. P.P. § 2(c). While the Proclamation allows for certain case-by-case exceptions to the ban on issuing visas, including "to visit or reside with a close family member" in the case of "undue hardship," the waiver provisions provide no indication — much less assurance — that LGBTQ visa applicants will be recognized as permitted to proceed under that narrow and perhaps illusory exception, as discussed *infra*. P.P. § 3(c)(iv)(D).

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[64] *Id.* at 585-86 (citing *Commentary to the Additional Protocols* of the 1949 Geneva Conventions).

The public interest in achieving the INA's explicit policy goal of family reunification is undermined by the Proclamation because the Proclamation prevents U.S. citizens and residents from sponsoring U.S. visa applications of LGBTQ family members located in the eight countries. The Proclamation deprives those U.S.-based family members of the fundamental right to family reunification, the very policy the INA was designed to accomplish. *See Solis-Espinoza*, 401 F.3d at 1094. As the Ninth Circuit put it in affirming the District of Hawaii's preliminary injunction, "[t]he public interest is not served by denying LGBTQ persons in the United States the ability to safely bring their partners home to them." *Hawaii v. Trump*, 878 F.3d 662, 701 (9th Cir. 2017).

For example, the Proclamation impairs U.S. citizens and residents whose fiancés or partners are located in the eight countries from exercising the fundamental right to marry, as their partners may be prohibited from obtaining a K-1 "fiancé(e)" visa to visit the United States. *See* P.P. § 3(c). That harm is exacerbated for same-sex couples because those individuals cannot travel to one of the eight countries to be married, as those countries do not recognize same-sex marriages. By the same token, U.S. children and family members of same-sex couples, unable to marry because they are stranded in one of the eight countries, are uniquely deprived of the ability to form a legally-recognized family, and thus are forced to bear "the stigma of knowing their families are somehow lesser" because their families receive unequal treatment under the Proclamation. *See Obergefell*, 135 S. Ct. at 2600. The Proclamation is thus an extension of the same context-blind

immigration policies that have disparately impacted LGBTQ immigrants and their families.[65] Or, worse, the Proclamation is an extension of the efforts to deny LGBTQ people equal treatment under the law in a myriad of other contexts.[66]

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[65] As this Court has recognized, the federal government until only very recently categorically discriminated against LGBTQ people in the immigration context by, among other things, making homosexuality grounds for inadmissibility and by refusing to recognize same-sex spouses. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2596 (noting that gays and lesbians have been "excluded under immigration laws"); *Boutilier v. INS*, 387 U.S. 118 (1967) (determining that the INA's exclusion of aliens afflicted with "psychopathic personality" was intended by Congress to exclude homosexuals from admission); *Bassett v. Snyder*, 59 F. Supp. 3d 837, 849 (E.D. Mich. 2014) ("The federal government categorically discriminated against gays and lesbians in immigration until 1990, barring all gay and lesbian noncitizens from entering the United States. . . . And the [INA] labeled gay and lesbian people as mentally ill." (citations omitted)).

[66] Given the stance it has recently taken with respect to LGBTQ issues, the Government is unlikely to pay heed to the unique hardships imposed by the Proclamation on LGBTQ people. For example, in July 2017, the President attempted to ban transgender individuals from serving in the U.S. military. *See Doe 1 v. Trump*, No. 17-5267, 2017 WL 6553389, at *1 (D.C. Cir. Dec. 22, 2017) (per curiam) (denying stay pending appeal of preliminary injunction because the Government had not shown strong likelihood of success on the merits of its challenge to the order preliminarily enjoining transgender military ban); *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 207-15 (D.D.C. 2017) (granting preliminary injunction on plaintiffs' showing of a strong likelihood of success on merits of their Fifth Amendment equal protection claims challenging transgender military ban); *Stone v. Trump*, No. MJG-17-2459, 2017 WL 5589122, at *15-16 (D. Md. Nov. 21, 2017) (same). The same month, the Government filed an amicus brief in which it argued that Title

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Although same-sex couples can utilize immigration benefits previously available only to opposite-sex couples, other avenues for family reunification remain closed or only available after surmounting additional hurdles. For instance, proving a parent-child relationship is significantly complicated, if not impossible, for a *de facto* parent who by the law of her country of origin cannot adopt or gain legal custody of her child, or marry the child's biological parent.[67] And given that in-laws are a "clear" example of close family, *see Trump v. International Refugee Assistance Project*, ___ U.S. ___, 137 S. Ct. 2080, 2088 (2017), no same-sex couples in the eight targeted countries have legally recognized or documented in-law relationships, unless they were married in a country that recognizes their relationships.[68]

The Proclamation indefinitely delays the ability of LGBTQ foreign nationals to leave the eight countries, even though some of these individuals could have strong cases to obtain visas by virtue of

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VII does not protect employees from discrimination based on sexual orientation. *See* Brief for the United States as Amicus Curiae, *Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (2017) (No. 15-3775), 2017 WL 3277292, at *4-14.

[67] *See, e.g.*, 8 U.S.C. §§ 1101(b)(1), (c)(1) (defining "child" to include a genetic child, a stepchild by marriage, a child legitimated by law, or an adopted child in the adoptive parent's legal custody).

[68] These examples illustrate how the Proclamation, even with waivers for "close family members," is too narrow to protect LGBTQ individuals' close family relationships.

their familial relationships with U.S. citizens or residents. Moreover, if LGBTQ visa applicants in the eight countries are forced to wait an indefinite period of time for the visa process to resume, they will be waiting in hostile political and social environments. Each day the Proclamation suspends the processing of visa applications, deserving visa applicants will be exposed to the likelihood of violence — and the certainty of discrimination — in the eight countries. *See Hawaii,* 878 F.3d at 701 ("[M]any of the affected nations criminalize homosexual conduct, and LGBTQ aliens will face heightened danger should they choose to apply for a visa from local consular officials on the basis of their same-sex relationships.").

III. THE PROCLAMATION'S WAIVER PROVISIONS FAIL TO MITIGATE THE HARMS THE PROCLAMATION INFLICTS ON LGBTQ INDIVIDUALS

A. LGBTQ People Are Disadvantaged In Applying For Waivers

The Proclamation's waiver provisions for visa-seekers do little to mitigate the harms LGBTQ individuals would face from the Government's enforcement of the Proclamation. The Proclamation allows for waivers of the suspension on visa-issuance for individuals with a "close familial relationship" to

someone living in the United States, including fiancés and immediate in-laws.[69]

The notion that the Government will issue a significant number of waivers to LGBTQ individuals from the eight affected countries, however, begs credulity in light of the Government's determination that the waiver provisions may only apply to "close familial relationships" that are "formal" and "documented."[70] As discussed above, LGBTQ individuals, whose familial relationships are often legally *un*recognized in their countries of origin — and therefore are unlikely to be formal, much less documented — will suffer a disproportionate and unjustified restriction on their ability to qualify for visas under the terms of the Proclamation. Moreover, the Proclamation is sharply limited so as to preclude visa applications based on relationships with "extended" family members, even though that definition perpetuates the outdated, context-blind definition of familial relationships that fails to effectuate, and here would undermine, the purposes of U.S. immigration law.[71] Thus, in contrast to similarly situated non-LGBTQ persons whose relationships are officially recognized in the eight affected countries, LGBTQ persons stand to be disproportionately excluded from the Proclamation's waiver provisions.

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69 U.S. Dep't of State, *Court Order on Presidential Proclamation on Visas* (Oct. 17, 2017), https://travel.state.gov/content/travel/en/news/important-announcement.html.

70 *Id.*

71 *See supra*, Section I.B.

Moreover, the fact that the waiver provisions require LGBTQ individuals to reveal information about their sexual orientation or gender identity to consular officers, and possibly the consulate's staff (often consisting of foreign nationals), poses additional dangers beyond those typically faced by LGBTQ persons seeking to travel to the United States. The resulting chilling effect on LGBTQ persons' willingness to apply for admission to the United States would only compound their suffering in the eight countries — and the suffering of their American relatives here.

The waiver provisions, therefore, do not diminish any of the special risks and dangers imposed by the Proclamation on LGBTQ people.

B. The Government Has Not Promulgated Instructions Or Regulations Requiring Equal Treatment Of LGBTQ People Applying For Waivers

Waivers are unlikely to offer real protection even to those visa-applicants who can document a basis for the waiver. Neither the Proclamation nor any other Government document or statement has provided visa-seekers with meaningful guidance on the criteria that will be used in considering waiver applications. Instead, applicants are left with the cold comfort that a consular officer or Customs and Border Protection ("CBP") official "may, in their discretion, grant waivers on a case-by-case basis." P.P. § 3(c). An applicant must prove to that official's subjective satisfaction that "denying entry would cause [him or her] undue hardship," that he or she

"would not pose a threat to the national security or public safety of the United States" and that his or her "entry would be in the public interest." P.P. § 3(c)(i).

The State Department has interpreted this language to mean that a consular official may only make a finding of the requisite undue hardship when "an *unusual* situation exists that compels immediate travel by the applicant and that delaying visa issuance and the associated travel plans would defeat the purpose of travel."[72] This vague language is insufficient, and could be easily abused, creating further uncertainty as to whether LGBTQ persons may obtain these waivers. Indeed, under this interpretation, LGBTQ waiver applicants who have long suffered in the eight countries ironically could be disproportionately disqualified from obtaining a waiver if they have made themselves temporarily safe due to a perceived lack of danger or exigency if they are not allowed to travel.

Concerns about the dangers of a lack of guidance are not merely speculative. The Department of Homeland Security Office of Inspector General ("OIG") has documented the fraught implementation of Executive Order 13769 ("EO 1"), the first iteration of the Proclamation, in a recent report.[73] The OIG concluded that the paucity

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[72] *See* U.S. Dep't of State, *Letter to The Honorable Chris Van Hollen* (Feb. 22, 2018) (emphasis added), http://fingfx.thomsonreuters.com/gfx/reuterscom/1/60/60/letter.pdf ("*Van Hollen Letter*").

[73] Dep't of Homeland Sec., Office of Inspector Gen., *DHS Implementation of Executive Order #13769 "Protecting the* *(cont'd)*

of guidance had undermined the Government's compliance with the law and court orders, contributing to the notoriously chaotic and unlawful enforcement of EO 1.[74]

For example, in the absence of guidance to CBP field officers in Los Angeles, an Iranian man arriving from Vienna was sent back to Austria, despite an injunction issued by a judge in New York that barred the Iranian national's removal. [75] Similarly, though barred by court order from removing certain individuals who were legally authorized to enter the United States, CBP nonetheless issued "no board" instructions to airlines to prevent such travelers from ever reaching the United States. [76] Without specific guidance explaining how the Proclamation's waiver provisions apply to LGBTQ individuals, the Government is likely to issue erroneous waiver denials or otherwise

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Nation from Foreign Terrorist Entry into the United States" (2018), https://www.oig.dhs.gov/sites/default/files/assets/2018-01/OIG-18-37-Jan18.pdf.

[74] *Id.* at 31-34, 37-38.

[75] *Id.* at 37 ("It appears that CBP officials had unverified reports of the order but, in the absence of official guidance, nevertheless required the traveler to leave.").

[76] *Id.* at 65-66 ("[T]he *Darweesh* court found that plaintiffs had a substantial likelihood of showing that CBP's actions violated the Due Process and Equal Protections clauses of the Constitution. The fact that CBP nonetheless felt itself free to deny boarding overseas seems to be a highly aggressive stance in light of the court's concerns.").

provide LGBTQ people with worse treatment than they deserve.

C. Even LGBTQ Applicants Who Meet The Waiver Criteria Face The Government's Systematic Denial Of Meritorious Waiver Applicants

The Government's pattern and practice of enforcing the Proclamation has already demonstrated that the waiver provisions do not alleviate the disproportionate harms suffered by LGBTQ visa-seekers. Following this Court's December 4, 2017 order permitting enforcement of the Proclamation, the State Department has systematically denied visas to applicants from the affected countries, providing little to no opportunity for applicants to apply for waivers and issuing widespread denials even to applicants who meet the facial requirements of the Proclamation's waiver provisions. As of March 6, 2018, the State Department confirmed that waivers had been issued to fewer than one percent of all visa applicants.[77] As of February 15, 2018, of the more than 8,000 people from the affected countries whose visa applications were processed in the month following this Court's December 2017 order, two waivers were granted.[78]

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[77] Yeganah Torbati & Mica Rosenberg, *Exclusive: Visa waivers rarely granted under Trump's latest U.S. travel ban – data*, Reuters (Mar. 6, 2018), https://uk.reuters.com/article/uk-usa-immigration-travelban-exclusive/exclusive-visa-waivers-rarely-granted-under-trumps-latest-u-s-travel-ban-data-idUKKCN1GI2DU.

[78] *See id.*; *Van Hollen Letter*, *supra* n.72.

Yet, only 6,000 applicants purportedly "failed to meet the criteria for a waiver."[79]

Evidencing the Government's neutered application of the waiver provisions, hundreds of Yemeni applicants, including those *who had already received* approvals for visas to join their families in the United States before the Proclamation took effect, were reportedly denied visas because of the Proclamation.[80] Those whose visas had been revoked had been informed that their visas were approved as early as last July and that the receipt of their passports was a matter of a printing delay.[81] But, mere days into the enforcement of the Proclamation, their visas were revoked with only an explanation that the previous approvals were unofficial and to be deemed provisional.[82] Three minor Yemeni children seeking to reunite with their U.S.-born father were granted visas on December 4, 2017.[83] Shortly thereafter, the children were told

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79 *Id.*

80 *See* Liz Robbins, *"Your Visa Is Approved," They Were Told. And Then It Wasn't*, N.Y. Times (Jan. 17, 2018), https://www.nytimes.com/2018/01/17/nyregion/immigrants-visa-yemen.html ("*Your Visa Is Approved*"); Mallory Moench, *The Yemenis trapped between war and US extreme vetting*, Al Jazeera News (Dec. 21, 2017), http://www.aljazeera.com/news/2017/12/yemenis-trapped-war-extreme-vetting-171216090452611.html.

81 *See Your Visa Is Approved*, *supra* n.80.

82 *See id.*

83 Sam Levin, *Tears, despair and shattered hopes: the families torn apart by Trump's travel ban*, The Guardian (Jan. *(cont'd)*

that they were no longer eligible and that no waivers would be granted.[84]

Reports abound of applicants from the affected countries seeking to reunite with family in the United States unable to obtain visas following the full implementation of the Proclamation. Waiver requests by Iranian nationals have been almost uniformly denied.[85] An Iranian woman's fiancée visa application was rejected without consideration of a waiver, although the visa was previously approved.[86] An Iranian man, the father of a U.S. citizen and the husband of a U.S. lawful permanent resident, was denied a family-based visa due to the Proclamation and was not given an opportunity to present evidence to support a waiver claim.[87]

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8, 2018), https://www.theguardian.com/us-news/2018/jan/08/trump-travel-ban-families-affected-first-month ("*Tears, despair, and shattered hopes*").

[84] *Id.*

[85] *See* The Public Affairs Alliance of Iranian Americans, *PAAIA And Iranian American Coalition Works with Senators to Seek Clarification of the Travel Ban "Waiver" Process* (Jan. 31, 2018), http://paaia.org/CMS/aaia-iranian-american-coalition-works-senators-seek-clarification-travel-ban-waiver-process.aspx.

[86] *See Tears, despair, and shattered hopes*, *supra* n.83.

[87] Center for Constitutional Rights, *A View from the Ground: Stories of Families Separated by the Presidential Proclamation* (Feb. 20, 2018), https://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/view-ground-stories-families-separated.

Numerous stories have emerged of visa and waiver denials issued to family of U.S. persons who have sought urgent medical treatment in the United States, even though the Proclamation expressly includes both close family members of U.S. persons and those seeking urgent medical care among its examples of those applicants for whom a waiver would be "appropriate." P.P. §3(c)(iv)(D) & (E). A U.S. citizen was unable to obtain a visa or a waiver for his 10-year old Yemeni daughter, despite demonstrating that his daughter was disabled and required time-sensitive medical attention no longer available in Yemen.[88]

The Proclamation has created debilitating administrative chaos as well. One waiver request by an elderly Syrian woman whose U.S. citizen son was approved to sponsor her for an immigrant visa languishes in "administrative processing" months after the December order.[89]

* * *

The combination of deficient guidance for consular officials and systematic denials of even worthy waiver applicants will result in particularly egregious harms to LGBTQ visa applicants in the eight countries. As the Fourth Circuit noted in addressing the public's interest in enjoining the Government from enforcing the Proclamation, the

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[88] *Id.*

[89] *Id.* (collecting additional stories of applicants unable to reunite with family members in the United States due to the Proclamation).

"[p]rolonged and indefinite separation of parents, children, siblings, and partners" resulting from the Proclamation "create[s] not only temporary feelings of anxiety but also lasting strains on the most basic human relationships cultivated through shared time and experience." *Int'l Refugee Assistance Project v. Trump*, Nos. 17-2231, 17-2232, 17-2233, 17-2240, 2018 WL 894413, at *18 (4th Cir. Feb. 15, 2018). For LGBTQ visa applicants, those public interest concerns are magnified due to the eight countries' hostility to the sheer existence of LGBTQ people. As a result, this Court should uphold the Ninth Circuit's affirmance of the District of Hawaii's preliminary injunction. The preliminary injunction is necessary to prevent the Proclamation from arbitrarily and unlawfully tearing LGBTQ families apart in light of the Government's insufficient consideration of LGBTQ applicants' kinship ties in the United States, as required pursuant to existing law.

CONCLUSION

For all the reasons stated above, *Amici Curiae* respectfully request that this Court affirm the decision of the Ninth Circuit, which upheld the preliminary injunction entered by the District of Hawaii, enjoining the Government from enforcing the Proclamation.

Respectfully submitted,

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